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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

BOISE CITY, a Municipal Corporation of the State of Idaho, (Plaintiff), Plaintiff in Error.

vs.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, (Defendant) Defendant in Error.

Brief of Plaintiff in Error.

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

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Statement of the Case.

This is an action at law brought by Boise City, the plaintiff in error, against The Boise Artesian Hot & Cold Water Company, Limited, a corporation, the defendant in error, to recover the sum of $10,130.00, alleged to be due the city as a license charge for the use and occupancy of its streets and alleys by the defendant in laying and maintaining its water works therein from June 7th, 1906, until April 1, 1909. The cause was originally instituted in the Distrct Court of the Third Judicial Distrct of Idaho and upon petition of defendant removed for trial to the United States Circuit Court for the District of Idaho.

The complaint discloses that the plaintiff is a municipal

corporation within Ada County, Idaho, and that the defendant is a private corporation organized and existing under the laws of the State of West Virginia; that on the 3d day of October, 1889, the plantiff by an ordinance granted to H. B. Eastman and B. M. Eastman, the predecessors in interest of the defendant in and to their water works, a license for an indefinite period to lay and repair water pipes in the streets and alleys of said city, through which water is now and at the times therein stated has been furnished to said city and its inhabitants for profit; that the plaintiff on June 7th, 1906, enacted and approved an ordinance requiring the defendant to pay the plaintiff on the first day of each month a monthly license of $300.00 for the use and occupancy of the streets and alleys of said city by the defendant in the sale and delivery of water to the plaintiff and its inhabitants, and for the privilege granted by said ordinance of October 3, 1889; that demand has been made upon the defendant for the payment of said monthly license, but payment has been refused; that the defendant and its predecessors in interest in and to said water works system, have never at any time paid to the city any compensation for the use and occupancy of said streets and alleys of said city when in operating its said water works system (Tran. pp. 1 to 8).

The defendant answered and admitted all of the allegations of the complaint except as to the ordinance of October 3, 1889, being a license for an indefinite period or that it was indebted to the plaintiff in any sum by reason of the enactment of the ordinances or use of the streets referred to in the complaint. And for a further answer it alleged that on July 10th, 1890, the Mayor and

Council of the plaintiff duly passed an ordinance granting to the Artesian Water & Land Improvement Company, a corporation, and its successors and assigns, the privilege of laying down and maintaining water pipes in the streets and alleys then laid out or thereafter to be laid out and dedicated in Boise City; that said corporation accepted the same and immediately proceeded thereunder and with due diligence to sink artesian wells, construct reservoirs and lay pipes along the streets and alleys of said city and to supply it and its inhabitants with water, and therein expended over $50,000.00; that H. B. Eastman and B. M. Eastman accepted the ordinance of October 3, 1889, and constructed a water system plant and laid their water mains and pipes under and along the streets and alleys of said city and up to the time they conveyed their plant to the defendant they had expended thereon the sum of $20,000.00; that on March 28th, 1891, the Artesian Hot & Cold Water Company, Limited, became the owner by purchase of the rights of said Eastman Brothers and of the Artesian Water & Land Improvement Company in and to said water works system and since said date has supplied water to the plaintiff and its inhabitants and has improved its plant to an expense of $192,000.00; that on August 28th, 1901, the defendant became the owner by purchase of the entire water works system and plant of the Artesian Hot & Cold Water Company, Limited, and since said date has supplied the plaintiff a city of over 25,000 population and its inhabitants with water and therein has expended more than $140,000.00; that the plaintiff and its Mayor and Council have claimed and are still claiming that the defendant is a mere licensee under a license which may

be revoked and annulled at the will of the Council, and the defendant avers that said ordinances when accepted and acted upon by the defendant and its grantors became and are franchises and binding contracts between the plaintiff and defendant; that the defendant during the whole time of its engagement in the business of supplying water has paid its due proportion of taxes, state, county, city and school taxes upon all of its property in said city and has charged and received water rates in accordance with the rate duly established by commissioners appointed under section 2711 of the Revised Statutes of Idaho, and the act of March 9th, 1905, both being now embraced in section 2839 of the Idaho Revised Codes; that the Capital Water Company, a corporation, organized under the laws of Idaho, is now engaged in the business of supplying water to plaintiff and its inhabitants under ordinances granted by plaintiff and the laws of Idaho, but said company is not required to pay any license or tax for the privilege of using said streets (Tran. pp. 19 to 31).

The plaintiff demurred to and moved to strike out certain parts of defendant's answer, for the reason that the facts therein stated do not constitute a defense to the cause of action set forth in the complaint (Tran. pp. 33 to 36). Upon the hearing the demurrer was overruled, and said motion was allowed as to paragraphs eight and fourteen of the answer, and as to the remainder thereof disallowed (Tran. pp. 47 to 57). The Court holding that the ordinances under consideration having been accepted and acted upon by the grantee and its successors creates a franchise for fifty years, which may not be impaired by the imposition of a license tax. Or in other words the

Court held that that part of section 2710 of the Revised Statutes of Idaho, 1887, providing that no contract must be made for a term exceeding fifty years should be read into the ordinance of July 10th, 1890, granting to the Artesian Water & Land Improvement Company the privilege of laying and maintaining water pipes in the streets and alleys of Boise City (Tran. pp. 47 to 56). Thereafter the cause was submitted to the Court upon the pleadings and an agreed statement of facts (Tran. pp. 80 to 88), and upon which the question being raised by objections to the introduction of proof to establish the affirmative allegations of defendant's answer on the ground that the same are incompetent, irrelevant and immaterial and do not constitute a defense to plaintiff's cause of action. The Court rendered its decision in which it held the same as it did in its opinion upon the demurrer and motion, and ordered judgment to be entered in favor of the defendant (Tran. pp. 57-63). It is from this decree that a writ of error is prosecuted in this cause.

Specifications of Error.

The plaintiff in error will rely upon the following errors based upon the assignment of errors heretofore filed (Trans. pp. 92 to 99).

FIRST.

That the Court erred in overruling plaintiff's demurrer to defendant's amended answer.

SECOND.

That the evidence showed that the plaintiff was entitled to recover in that it appeared from the evidence, and particularly from ordinances No. 94, set forth in paragraph

three of plaintiff's amended complaint, approved October 3, 1889, and Exhibit "A" attached to defendant's amended answer, approved July 10, 1890, which granted to defendant's predecessors in interest the privilege of laying down, repairing and maintaining water pipes in the streets and alleys of Boise City, and under and by virtue of which defendant claimed the right to the use of the streets and alleys of said Boise City, for the purpose of laying down, repairing and maintaining its water pipes, do not provide the length of time such privilege can be enjoyed.

THIRD.

That the evidence showed that the plaintiff was entitled to recover from the defendant for the reason that it appears from Ordinance No. 678, approved June 7th, 1906, that the defendant is required to pay to plaintiff a monthly license for the use and occupancy of the streets and alleys of Boise City for the sale and delivery of water to the plaintiff and its inhabitants.

FOURTH.

The Court erred in rendering judgment for the defendant for the reason that it appears from Ordinances No. 94, and Exhibit "A" above referred to that defendant had but a mere license to the use of the streets and alleys of Boise City.

ARGUMENT.

The defendant has no franchise or contract right to the use of the streets and alleys of Boise City, as the city has only granted by the ordinances of October 3, 1889, *and July* 10*th*, 1890, *a license, and can require as a further con-*

tinuation of said license the payment of a license fee for the use of its streets and alleys.

We presume that it will not be disputed that unless the defendant has a franchise or contract with the plaintiff for the use of the streets and alleys of plaintiff and is occupying the same for an indefinite period under a mere license from the city, the city can require as a further continuation of said license and use the payment of compensation. This is the crucial question in the case.

We further presume that it will not be controverted that before a person or corporation can acquire the right to occupy and use the highways of a city, such right must be granted by either an act of the legislature or the mayor and council of the city. That whatever rights the defendant has to the use of the streets and alleys of Boise City must come from the ordinances of October 3, 1889, and July 10, 1890. It will be observed from a reading of said ordinances relied upon by the defendant as granting to it the right to the use of the streets and alleys of the city, no term was fixed for the duration of the privilege. That they do not possess any element of a franchise or a contract, but are merely licenses subject to the requirement by the city as a further continuation thereof to the payment of a license fee for the use of the streets and alleys. They certainly do not contract with the defendant or its predecessors in interest that they can occupy and use the streets and alleys of the city for a definite or fixed period. Before entering upon a discussion of this proposition as to whether the defendant under these ordinances has a franchise or contract right to the use of the highways of Boise City for a period of fifty years, or any number of years, we invoke, in the first place, the general rule

that they take nothing in the way of a grant, franchise or contract by intent or implication. They must show by clear and express terms of the grant, franchise or contract that the right or privilege to the use of the streets and alleys is expressly given in said ordinances, for all that is not expressly and especially given is presumed against the company and in favor of the City or State. This rule of law is now elementary.

In the case below the question involved was the validity of a provision against the grant in the charter of a corporation to do certain things, it was said: "The rule of construction in this class of cases is, that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

Northwestern Fertilizing Co. vs. Hyde Park, 93 U. S. 659; 24 L. Ed. 1036.

This rule has been invoked, of course, a great many times and applied to a multitude of charters, ordinances and grants, and we simply give a few of the authorities and references, which may be of interest in the further investigation of this subject.

Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116; 51 L. Ed. 399.

Knoxville Water Co. vs. Knoxville, 200 U. S. 22; 50 L. Ed. 353.

Sidell vs. Granjean, 111 U. S. 412; 28 L. Ed. 321.

Coosaw Mining Co. vs. South Carolina, 144 U. S. 550; 36 L. Ed. 537.

Pearsall vs. G. M. Ry. Co. 40 L. Ed. 838; 161 U. S. 646.

Clark & Marshall on Corps. Vol 2, pp. 983-985.

Phoenix Inst. Co. vs. State, 40 L. Ed. 660; 161 U. S. 174.

Covington vs. Stanford, 41 L. Ed. 566; 164 U. S. 578.

Hoge vs. Railway Co., 25 L. Ed. 303; 99 U. S. 348.

Bank of Commerce vs. Tenn., 26 L. Ed. 810; 104 U. S. 493.

Syracuse Water Co. vs. City, 116 N. Y. 167.

Viewing the ordinances of October 3, 1889, and July 10, 1890, in the light of these decisions, it is clear that they can avail the defendant nothing in this action in its contention that said ordinances under the laws of the State of Idaho grant a franchise or contract right for the period of fifty years to the use of the streets and alleys of the city, and all that the defendant has under them is a mere license, subject to a requirement by the city to the payment of a license fee for the continuation of the use of the streets and alleys. We repeat that these ordinances are wholly silent upon the subject of the right of the defendant to use and occupy the streets and alleys of the city for any definite period. They simply give defendant the right to *lay and maintain water pipes* in the streets and alleys of the city for no limited time. All other matter relative to the period which defendant can continue occupying and using said streets and alleys, and the payment of a license or compensation to a city for the use of its streets and alleys, are open to future contract and future legislation by the

city. These ordinances do not in any way inhibit or contract against future legislation on the part of the city, and whether the privileges under these ordinances were in the hands of the Eastmans, or their successors, the corporation, they were subject to such obligations, charges, license and duties as the city might reasonably impose. And the duty here imposed by the ordinance of June 7th, 1906, is one which the courts has held proper and reasonable under the conditions which defendant is occupying and using the streets and alleys of the city, there being nothing in the nature of a contract or franchise in these ordinances against the city requiring the payment of a license fee for the continuation of the use of its streets and alleys. The defendant and its predecessors in interest entered upon the occupancy and use of the streets and alleys subject to a license which the city might impose upon it. There is nothing in the ordinances or elsewhere, to prevent the council of the city from requiring the defendant to pay such license. The defendant and its predecessors in interest have seen fit to engage in a business by entering upon the streets and alleys of the city under said ordinances, which do not contain any definite term, or the payment of any compensation to the city for the use of its streets and alleys. They elected to go into such business under such ordinances, and when they did so they placed themselves in a position where they could not complain of the requirement of the city at any time to pay it compensation for the use of its streets and alleys. What we say is that when the water company, for instance, is organized for the purpose of supplying the inhabitants of the city with water and entered upon the streets and alleys of the city under the ordinances, which fail to contain

any element of a contract or franchise exempting it from the payment of a license fee for the use of said streets and alleys, such corporation organized and conducting its business under such conditions is subject to such requirements as is imposed by said ordinance of June 7th, 1906. These ordinances are not contracts which can be enforced in perpetuity by either party. There is no word or clause in them that binds the company to continue to furnish water under them. They are not mutually enforceable. Their continuance is optional, and if the company desired not to pay such license fee required by said ordinance of June 7th, 1906, as a continuance for the use of the streets and alleys it could cease using and occupying the same.

It will be conceded, we presume, that the ordinance of July 10, 1890, is not in substance distinguishable from the Eastmans' ordinance of October 3, 1889, so far as the express language is concerned. It is clear from a reading of these two ordinances that no franchise or contract right has been granted to the defendant and it is necessary for the defendant to look elsewhere in its endeavor to establish a contract or franchise with the city. This question as to whether or not said ordinance of October 3, 1889, granted a franchise or contract to the predecessors in interest of the defendant, was in an action at law between the city and the defendant decided by the Circuit Court of Appeals for the Ninth Circuit. The Court said:

"The plaintiff in error contends that the statute of 1887 confers upon the City of Boise no right to take water free from it or its predecessors, for the reason that they were protected by the franchise given to the Eastmans. There can be no doubt that the grant of a privilege to lay water pipes and furnish the inhabitants of a municipality with

water for a stated period of time, accepted and acted upon by the grantee thereof, is a grant of a franchise given in consideration of the performance of a public service, and is protected against hostile legislation by the State. * * * But had the Eastmans such a contract with the city as to come within the rule just cited? The ordinance of October, 1889, granted permission to the Eastmans and to their successors in interest to lay and repair their pipes in the streets of the city, and to furnish water to the inhabitants thereof. No term was fixed for the duration of the privilege, and no contract was in terms made between the city and the grantees of the privilege. It is plain that the ordinance was either the grant of a license revocable at will of the grantor, or, by its acceptance on the part of the grantee, it became an irrevocable and perpetual contract. No middle ground is tenable between these two constructions. * * * From these principles and authorities it follows that the Eastmans were given no exclusive or perpetual right, and that the ordinance operated to grant them a license only, and left the city free at any time to revoke the privilege granted, or to put in its own water works, or to grant a franchise to another company. The most that the licensees could claim under it was that it legalized their use of the streets for supplying water and gave them permission to occupy the same until such time as the city might see fit to terminate the privilege."

Boise Artesian Hot & Cold Water Company vs. Boise City, 123 Fed. 232.

President, etc., of Colby University vs. Village of Canandaigua, 96 Fed. 449.

It was contended by counsel for defendant in the court below that the case of the President, etc., Colby University vs. the Village of Canandaigua, 96 Fed. 449, cited by Judge Gilbert in the above case does not sustain his opinion. One of the questions presented and decided by the Court in the Village of Canandaigua case was whether or not there was a franchise or license granted by the city. It does appear that the village authorities only permitted the corporation to lay its pipes in the village streets and the question arose as to whether or not the corporation had a franchise which would preclude the village from constructing a water system of its own, without taking by purchase or condemnation the property of the corporation. And the Court held: "No canon of construction is familiar to the Court which transforms plain and unambiguous language permitting an act to be done into a positive command to do the act. So far as the written law is concerned there can be little doubt that villages in this State may build and own their own water supply notwithstanding the fact that private corporations are in the field, provided the village authorities have done nothing more than permit the corporation to lay its pipes in the village streets. In the present instance the village simply granted a naked permission to do this to the company. It was a license, and nothing more."

We take it that the decision of this Court in the case of Boise City Artesian Hot & Cold Water Company vs. Boise City, *supra*, is controlling upon this question as to the language of the ordinances not expressing the elements of a franchise or contract. The decision is based upon sound reason and decisive of this proposition.

It was also contended that sections 2710 and 2712 of the

Revised Statutes of Idaho, 1887, were overlooked by the Court. That the ordinance of July 10th, 1890, was not considered by the Court. That where a license is granted, although for an indefinite period and on the faith of which the grantee has made expenditures, the city is estopped from requiring the grantee to pay for the use of its streets and alleys. Under these contentions we are called upon to consider, first, an analysis of the decision of Judge Gilbert, for the purpose of ascertaining what were the questions presented to the Court in that case. It will be noticed that the bill of the water company in that case disclosed that the city had no right to the use of water free from its pipes for sprinkling purposes, because the ordinance of October 3, 1889, known as the Eastman ordinance, granted to the water company a *franchise*. The answer of the city in that case among other things, made denial of this allegation, thereby presenting to the Court as one of the questions as to whether or not the Eastmans ordinance was a grant or a *franchise*. It is evident from a reading of sections 2710 and 2712 of the Revised Statutes of Idaho, 1887, the Court did not overlook or deem them applicable when in deciding that case, for said section 2710 does not purport to prescribe what a grant or contract made by the city shall contain.

The authorities seem to agree that where no period of time is fixed by the instrument for its duration, which is claimed to be a contract, the same is not binding upon either party thereto and is subject to the payment of reasonable compensation thereunder for the use of the property therein referred to.

"If no time is fixed by the contract for its duration and the contract from its nature is one which might last in-

definitely, either party may at its option terminate such contract."

Page on Contracts, Vol. 3, p. 2110.

Western Union Tel. Co. vs. Pennsylvania Company, 125 Fed. 67.

Jones vs. Newport News and Pb. Co. 65 Fed. 736.

We find that the Supreme Court of the United States has, in the case below, laid down the rule for which we are contending in this case. The question before the Court was as to the right and power of the City of St. Louis to charge the Western Union Telegraph Company for the use and occupancy of its streets and alleys. There were no contractual rights existing between the city and the telegraph company. The company contended that it had a right to the use of the streets of the city under an act of Congress and a general ordinance of the city permitting it to use the streets. The city, after the company had constructed its poles, adopted an ordinance requiring the company to pay it a certain sum for the use of said streets and alleys. The company refused to pay the amount claimed by the city, so suit was instituted in the State court by the city against the company for the recovery of $22,635 for three years' use of its streets. The case was removed to the Federal Court upon application of the company, and the highest court of the land sustained the right of the city to charge for the use of its streets and alleys. We incite the Court's attention to this decision as it settles this question.

City of St. Louis vs. Western Union Telegraph Co. 148 U. S. 92; 37 L. Ed. 380.

That Section 2710 of Revised Statutes of Idaho, 1887, now embraced in Section 2839 of the Idaho Revised Codes, relied upon by the defendant, does not operate to extend the privilege and license referred to in said ordinances of October 3, 1889, and July 10, 1890, for fifty years, or any definite period, as said statute is merely a limitation upon the power to contract, and not a provision of the contract.

We understand that the defendant's main contention is that while the ordinance of July 10th, 1890, is not in substance distinguishable from the ordinance of October 3, 1889, so far as the express language is concerned, still in as much as said ordinance of July 10, 1890, runs to a corporation, the Court in construing it should read into it a clause providing that the privilege granted shall continue for fifty years because of said Section 2710 of the Revised Statutes of Idaho, which reads as follows:

"No corporation formed to supply any city or town must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rate for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years."

In other words, in the absence of language in the ordinance defining the term, this Statute operates to extend the grant for a maximum period, which could have been legally specified. It is evident from an analysis of this Statute relied upon by the defendant that no provision will be found purporting to define or prescribe what the contract or grant shall contain, but what it shall not con-

tain. It does not operate to extend the privilege and license referred to in said ordinances for fifty years or any definite period as the Statute is a limitation upon the power to contract, and not a provision of the contract.

As was logically said by Judge Dietrich in the case of the Boise Artesian Hot & Cold Water Company vs. Boise City, when in construing this Statute and passing upon the identical question involved in this case, that: "Possibly influenced in a measure by the representations made in the bill that the defendant is disposed to deal unjustly with the plaintiff, and the earnest appeal of counsel for protection against impending confiscation of the plaintiff's property, I have given sympathetic consideration to this contention, hoping that thereby, without destroying the integrity of the law, the relations between the parties might be so defined that neither would be able to do grave injustice to the other, but I have been unable to accept the construction as either a natural or a probable one. The statutory provision relied upon does not purport to define or prescribe what the contract or grant shall contain but what it shall not contain. It is a limitation upon the power to contract, not a provision of the contract. It is not mandatory, but prohibitive. If it provided that in the absence of express agreements the term should be fifty years, then it would naturally take its place in every contract or grant silence as to the term. Suppose that the language were, "No contract or grant must be made for a term less than five years or more than fifty years," what would be the term of a grant like that under consideration? Would there be any more reason to presume the maximum than the minimum? Upon the other hand, by the familiar rule that public grants susceptible of two

constructions must receive the one most favorable to the public, would we not be compelled to adopt the minimum? No substantial distinction can be made between the hypothetical Statute and the provision under consideration: in both cases the maximum is fifty years; in the one the minimum is a grant for five years, in the other a grant revocable at will." Opinion filed June 1st, 1907, but not reported. The case last above referred to which was between the same parties in this action was appealed to the Supreme Court of the United States and the decision of Judge Dietrich was sustained upon the proposition that the bill of complaint in the case did not state facts sufficient to give a court of equity jurisdiction.

It is clear to the mind that the said Section 2710 does not apply to or extend the period of time to fifty years in which the water company can occupy and use the streets and alleys of the city, but if it applies at all, it only provides a limitation upon the city authorities when in contracting with the water company, as this Statute reads: "*No contract or grant must be made for a term exceeding fifty years.*" It certainly can not be contended that the water company could enter upon and use the streets and alleys of the city without first obtaining a franchise or contract from the city under this provision of our statute. Then, if that be true, the city has the undoubted right when in granting such franchise or contract to prescribe the period of time, or limit the life of such franchise or contract, and when in doing so this Statute merely places a limitation upon the power given to the council of the city when in granting such franchise or contract.

In the case below the Court had before it the consideration of a Statute of the State of Ohio, which provided: "That no grant nor renewal of any grant for the construction or operation of any street railroad shall be valid for a greater period than twenty-five years from the date of such grant or renewal." The Court said: "The general law gives authority to the council to consent to the use of the city's streets for street railroads, and, as we have seen it was not until 1878 that a proviso was added to the effect that no grant or renewal (that is to say, no grant or renewal under Sections 2501 and 2502) should be valid for more than twenty-five years. This proviso is a limitation upon the plenary power, theretofore given by the State to the council, and no more is to be substracted, in consequence of that proviso, from that plenary power thus delegated than its express terms permit."

Cleveland Electric R. Co. vs. City of Cleveland, 137 Fed. 111-129.

Under the charter of Boise City the Legislature of this State has granted to it full control of its streets and alleys. We quote the portions of the charter of the city, with reference to this authority:

"To provide the city with good and wholesome water, and for the erection or construction of such water works and reservoirs within or without the limits of the city as may be necessary or convenient therefor." (Subdivision 9 of Section 5.) And further: "The roads, streets and alleys within said city limits shall be under the exclusive control of said common council, who shall make all needful rules in relation to the improvement, repair, grading, cleaning, etc., of the same, and said city shall not be in-

cluded in any road district in said county." (Section 10, approved January 11, 1866.) And further: "To provide the city with good and wholesome water, by contract or otherwise and for the erection or construction of such water works and reservoirs within or without the limits of the city, as may be necessary or convenient therefor." (Subdivision 9, Section 5, approved March 12, 1897.) And further: "To regulate the opening of street surfaces, the laying of gas and water mains, the building and repairing of sewers and the erection of electric, gas and other lights." (Approved March 14, 1901.)

When we invoke the admitted rule, that where a municipality has the power to give or refuse consent to the occupation and use of its streets for any purposes, it may impose terms and conditions, including a time limit; and an acceptance of a grant carries with it all the conditions and limitations upon which it is based.

Chicago Terminal Transfer R. Co. vs. Chicago, 203 Ill. 576; 68 N. E. 99.

Detroit vs. Ft. Wayne & B. I. Co. 95 Mich. 456; 54 N. W. 958.

Alleghany vs. Millville E. & S. R. Co. 159 Pa. 411; 28 Atl. 202.

City of Indianapolis vs. Consumers' Gas. L. Co. 140 Ind. 107; 39 N. E. 433.

The principle which we are contending for as to the power of the city to limit the tenure of a grant or privilege to occupy its streets is clearly recognized in the case below when in construing a Statute limiting the city to a period of twenty years in granting a privilege to the use of its streets, the Court said: "The city being a source of the

grant, not merely a consentor to it, the terms and duration of the grant to that end were prerogatives of the city, delegated by the State, and the gas company was powerless, equally with any individual to exact terms or privileges. It could only accept or refuse such terms as were tendered. * * * Thus, in fixing by this ordinance the tenure during which the grantee was permitted to occupy the streets with its pipes and served the inhabitants with natural gas, it was within the power of the city to limit the tenure, either to a definite number of years, or to terminate after a given period at the option of the city, as was in effect provided by Section 18."

In the concurring opinion of Judge Grosscup, it is said: "The sole right of the company to enter upon the streets of Indianapolis, was under a grant from the City of Indianapolis. Under the laws of Indiana, the city is not simply a consentor—the city is the source of the grant; and being the source of the grant has the right to impose upon the grant, as to tenure, as well as to other terms and conditions, just such limitations as it deemed wise."

City of Indianapolis vs. Consumers' Gas Trust Co. 144 Fed. 640-44-48.

Sullivan vs. Bailey (Mich.) 83 N. W. 996.

City of Houston vs. Houston City Street Ry. Co. 19 S. W. 127.

It should be borne in mind that there is a distinction between grants conferred by the State and obtained by organization under the State law, and those contractional grants not given by the State but which come from the local authorities having the right to grant the use of a city highway. The principle of law is too well settled in this

country as to now be open for discussion. The cases holding that the life of a franchise not containing a fixed period granted by the Legislature is the period fixed for the life of the corporation, are not grants given by municipalities.

"The argument that, because the State had imposed no limitation upon the duration of the corporate franchises of this company, theretofore the term for which it held its street grants was likewise intended to be unlimited, is illogical. It loses sight of the distinction between those franchises conferred by the State and obtained by organization under the State law and those property or contractual franchises not granted by the State, and not inherent in the corporation as such, but which come from the local authority having the right to grant the right to occupy a public highway."

Louisville Trust Co. vs. City of Cincinnati, 76 Fed. 296-308.

Blair vs. City of Chicago, 201 U. S. 400; 50 L. Ed. 801.

That said Section 2839 of the Idaho Revised Codes is a general law of the State of Idaho, and has no application to the plaintiff Boise City, which is now and ever since January 11, 1866, has been incorporated under a special charter granted to it by the Legislature.

It will be observed from the answer of the defendant and its position heretofore taken in this case upon the plaintiff's demurrer thereto, that the defendant relies solely upon the application of Section 2710 of the Revised Statutes of Idaho, 1887, now embraced in Section 2839 of the Idaho Revised Codes, in its contention that Boise City had granted to the Artesian Water and Land

Improvement Company, and its successors in interest, a franchise for a period of fifty years. At the time of the adoption of said ordinance of July 10th, 1890, the plaintiff Boise City was, and now is, existing under a special charter granted to it by the Legislature on January 11, 1866, and in said charter it is provided: "The mayor and common council shall have full power and authority within Boise City * * * to provide the city with good and wholesome water; and for the erection and construction of such water works and reservoirs within or without the limits of the city as may be necessary or convenient therefor * * *." City charter of Boise City, Sec. 5, Sub. 9. It is further provided in Section 10 of said charter that "The roads, streets and alleys within said city limits shall be under the exclusive control of said common council, who shall make all needful rules in relation to the improvement, repair, grading and cleaning, etc., of the same, and said city shall not be included in any road district in said county."

It is further provided that Section 32 of said charter, "To regulate the opening of street surfaces, the laying of gas and water mains, the building and repairing of sewers, and the erection of electric, gas and other lights."

Thus it will be seen from the above provisions of the special charter of the plaintiff Boise City, full power and authority is granted by the Legislature to it to provide the city with good and wholesome water. Therefore, the city is the source of any grant or franchise, and being the source of such grants or franchises we look to the provisions of its special charter in determining what period of time a right is granted in considering an ordinance like the one in question.

Under plaintiff's contention that said Section 2710 of the Revised Statutes of Idaho, 1887, now embraced in Section 2839 of the Idaho Revised Codes, is a general law of the State and has no application to the plaintiff Boise City, nor does it amend the special charter of the plaintiff, suggests two inquiries.

First. What is the settled law of the State of Idaho?

Second. If it be as claimed by the plaintiff, is it binding upon the Federal Courts?

The answer to the first inquiry is clear. The question as to whether or not a general law of the State relating to the power and authority of Boise City to issue and contract for the sale of local improvement bonds under a general law, was presented to the Supreme Court of Idaho in the case of Boise City National Bank vs. Boise City, 100 Pac. 93. In that case the question before the Court was as to the application of the general law of the State to the plaintiff Boise City, and the Court after reviewing and considering a provision of the special charter of Boise City and a general law of the State laid down the following rule:

"We have in this State cities which were organized under and granted certain powers, by special charters, enacted by the Legislature prior to the adoption of our State Constitution. Sec. 2 of Art. XXI of our State Constitution continued such special charters in force after the Constitution went into effect. We have other cities that have been organized under the general municipal corporation law of the State. Section 1, Art. XXII, of the Constitution, provides, among other things, that the Legislature shall enact general laws for the incorporation and classification of cities and town and that cities and towns

theretofore incorporated under special charters may become organized under such general laws whenever a majority of the electors at a general election shall so determine under such provisions of law as may be enacted by the Legislature. Boise City has never become organized under the general laws of the State, but has continued to exist and do business under the powers granted it by its special charter. * * * "Under the provisions of Section 1, Article 12, of the Constitution, it is provided that cities and towns theretofore incorporated may become organized under the general laws whenever the majority of the electors at a general election shall so determine, under such provisions therefor as may be made by the Legislature. This clearly indicates the cities incorporated by special charter do not come under the general laws of the State until the majority of the electors of such city at a general election for that purpose shall so determine. We think it clear that the powers of Boise City in regard to creating indebtedness and paying the same must be determined by the provisions of its charter, and not by the provisions of said bonding act of 1905, which is a general law applicable to all cities incorporated under the general law for incorporating towns and cities. * * * If the Legislature has the power under the Constitution of Idaho to make the general bonding act of 1905 relating to internal governmental affairs of cities and villages apply to Boise City by merely inserting in that act a section to that effect, then the Legislature may make the general act governing cities, towns and villages throughout the State, or any part thereof, apply in the same manner and without a consent of the majority of the electors as is required by Section 1, Article 12, of the Constitution. If the Legisla-

ture could do that it would annul said provision of the Constitution entirely. To permit the Legislature to amend special charters of cities in matters of local government by general laws would be contrary both to the letter and spirit of the Constitution. This Court held in McDonald vs. Doust, 11 Idaho, 14; 81 Pac. 60; 69 L. R. A. 220, that acts inconsistent with the spirit of the Constitution are as much prohibited as are acts specifically enumerated and forbidden therein. City of Lexington vs. Thompson, 113 Ky. 540; 68 S. W. 477; 57 L. R. A. 775; 101 Am. St. 361.

The special charter of Boise City is recognized and continued in force by the Constitution, and a method of amending it by special laws is clearly contemplated by the Constitution. All the limitations upon the Legislature in regard to special legislation are found in Section 19, Article III, of the Constitution. Butler vs. City of Lewiston, 11 Idaho, 393; 83 Pac. 234. We have no provision in our Constitution such as is found in the Constitution of some other States, to the effect that no special laws shall be passed where general laws can be made applicable. It followed, therefore, that these special charters may be amended by special laws to meet the requirements of growing cities, but can not be amended by general laws. The act of February 24, 1905, is an example of how general legislation could be made to effect cities under special charters without the attention of the people of the city or even the members of the Legislature ever being called to that fact, because no reference to its application to such cities is mentioned in the title of the bill. There is nothing in the title of this act which could indicate that it is proposed to affect or amend the charter of Boise City. The title of the act of February 24, 1905, in-

dicates that it is a general law providing for the issuance of bonds of incorporated cities, towns and villages organized under the general incorporating laws of the State. The title is general, while in Section 10 of said act it is provided that said act shall be construed as additional and confirmed authority to cities under special charters. That part of said act is void because it is not embraced in the title, and, if it were embraced in the title, it could not affect Boise City, as above shown. We therefore hold, under the various provisions of our Constitution above quoted, that the Legislature can not amend the special charter of Boise City by a general law. Such amendment can only be made by special laws.

"The judgment is therefore reversed, and the case remanded, with instructions to enter judgment in favor of the appellant as prayed for in the complaint. Costs are awarded to the appellant."

Boise City National Bank vs. Boise City, 15 Idaho, 792; 100 Pac. 93.

The above doctrine has never been departed from by the Supreme Court of Idaho and is now the settled law of the State.

The Court will further observe that the defendant in its answer avers that the ordinance of July 10, 1890, to the Artesian Water and Land Improvement Company, a corporation, and which the defendant claims that the 50-year statute should be read into, was passed by the mayor and council of the plaintiff, "*under authority contained in its charter and the general laws of Idaho.*" The contention of the defendant then being that authority for the adoption of said ordinance of July 10, 1890, was given both under

the *charter* of Boise City and the *general laws of Idaho.*

Judge Gilbert, in his opinion on the trial of this cause, refers to the case of Boise City vs. Artesian Hot & Cold Water Company, 4 Idaho, 351, as a controlling decision on the question under consideration on the theory that it expressly holds that the chapter of the Idaho Statutes relating to water corporations is applicable to Boise City. With all deference to the opinion of Judge Gilbert we take the view that the opinion in that case does not go to the extent that he claims. That was a suit brought by Boise City to restrain the defendant company from cutting off water furnished to the city for fire purposes. There was no allegation in the complaint that the defendant company was authorized either by ordinance or contract to furnish water to Boise City and its inhabitants and the demurrer to the complaint was sustained on that ground. At the very opening of the opinion the Court uses this language: "The date given as the time when this corporation was organized and commenced business was at a time when the statute (Idaho Revised Statutes, Sections 2710-2712) was in force and therefore the said corporation is *subject to the provisions thereof.*" The Court in its opinion no where holds that Boise City is subject to the provisions of said sections, nor is the question whether Boise City is a municipal corporation organized under the general laws of the State or under special charter considered. The only thing decided by the Court is that any corporation organized for the purpose of furnishing water to a city and its inhabitants must get its authority to do so either by ordinance or contract. In other words, it was held that the Statute meant that no corporation organized for the purpose of furnishing water to a city and its inhabitants in

Idaho could exercise its powers in so doing without first securing authority either by ordinance or contract. It was not intended as a curtailment or limitation of the powers of the city in dealing with the water company, but it was intended as an obligation upon all companies organized for the purpose of furnishing water to cities and their inhabitants. The statute relates solely to the powers, duties and obligations of water companies formed for the purpose mentioned and has no reference whatever to the powers and duties of cities organized either under a general or special law. While we contend that a general law passed by the Legislature has no application to Boise City, we do not by any means go to the extent of claiming that the Legislature has not the power to pass a law providing what shall and what shall not be the powers and obligations of a corporation organized for the purpose of supplying water to cities and their inhabitants or for any other purpose.

One thing must be conceded and that is the sections of the statute here referred to are general in their application. Conceding for the moment that the Supreme Court of Idaho in the case of Boise City vs. Artesian Hot & Cold Water Company, *supra*, held that these sections of the Statute were applicable to Boise City, although the question as to whether Boise City was incorporated under the general laws of the State or under a special act was not considered. We contend that the case of Boise City vs. Artesian Hot & Cold Water Company, *supra*, was overruled by the case of Boise City National Bank vs. Boise, *supra*, for the reason that that is the latest utterance of the Supreme Court of Idaho, and the question as to applicability of a general law of the State to a city operat-

ing under a special charter was there directly involved, and it was there held that in matters of purely local concern a general law of the State had no application.

The question then arises whether the control of the streets is such a matter of local concern as to fall within the rule laid down in that decision. We take the view that the control of the streets of Boise City is a municipal as distinguished from a governmental function.

"All functions of a municipal corporation not governmental are strictly municipal. They are sometimes called private just as governmental are called public. Under this class of functions are included, in most jurisdictions, the proper care of streets and alleys, parks and other public places, etc. Logically, all those are strictly municipal functions which specifically and peculiarly promote the comfort, convenience and happiness of the citizens of the municipality rather than the welfare of the general public."

Cyc. of Law and Procedure, Vol. 28, pp. 268-269.

"There is an essential difference between cases where the matter is a general governmental one and cases where the matter is so peculiarly one of municipal control and local interest as streets."

Elliot on Streets and Roads, 426.

"The object of incorporating a town or city is to invest the inhabitants of the locality with the government of all the matters that are of specific municipal concern, and certainly the streets are as much of *special* and *local* concern as anything connected with the town or city can well be."

Elliot on Streets and Roads, Sec. 417.

The control of the streets being exclusively in the city it seems there can be no doubt that the city would have the absolute right to say under what conditions and for what length of time a franchise to use the streets could be granted. Being a matter of purely local concern, under the decision of the Supreme Court of Idaho in the case of Boise City National Bank vs. Boise City, *supra*, no general law of the State could have any possible application to a franchise granted by Boise City and certainly could not be read into any franchise granted by the city.

The mere fact that the defendant has made expenditures in the enlargement of its system and is furnishing water to the city and its inhabitants for profit in accordance with the rates fixed by a commission and is paying the taxes levied upon its property under the general laws of the State, or because the Capital Water Company, who has a contract with the city for a fixed period is not required to pay a license fee, do not become a part of or to be read into said ordinances of October 3, 1889, *and July* 10, 1890, *or estops the city in the absence of a franchise or contract from requiring the defendant to pay compensation for the use of its streets, as these matters are equitable defenses and can not be interposed in an action at law in the Federal Courts.*

This is an action at law, but the defendant in its answer seeks to establish an equitable defense to the action. The allegations of the defendant's answer to the effect that it has expended large sums of money on the faith of the ordinances, referred to, that the city has acquiesced in the use of its streets, that its property has been assessed for state, county, city and school taxes, and in the same manner as other property, and that it has each and every year

paid to the proper tax collector the amount of all taxes assessed against its property and that the plaintiff city has granted to another water company, known as the Capital Water Company, a franchise for the purpose of supplying the plaintiff and its inhabitants with water, and that the Capital Water Company is now, and for a long time past has been, engaged in the business of supplying water to the plaintiff and its inhabitants and using and occupying the plaintiff's streets and alleys for such purposes, without being required to pay the plaintiff any license or tax whatever for such privilege and that there are numerous other individuals, associations and corporations using plaintiff's streets and alleys for the purposes of supplying the plaintiff and its inhabitants with electric lights, gas, streets railways, telegraph and telephone purposes, without being required to pay the plaintiff any license or tax whatever, are purely matters of equitable consideration and can not be plead in an action at law in the Federal Courts as a defense.

It will be noticed from defendant's answer that its predecessor in interest voluntarily went to the city and asked for the privilege and license granted by said ordinances, and that the city only, by the term thereof, granted permission to lay water pipes in its streets and alleys for an indefinite period. There was no contract made between them, nor has the defendant or its predecessors in interest ever at any time paid the city in any way for the use of its streets and alleys, which they have been using free of charge for a long time, and have and now claim the right to compensation for water furnished to the city for certain municipal purposes. It makes the request that it should receive compensation for the water furnished to the city

and at the same time be permitted to use the streets and alleys free of charge.

This plea of defendant's that if it is required to pay for the use of the streets and alleys of the city under said ordinance of June 7, 1906, would bring hardship to it, although it appears to be furnishing water at a profit to the inhabitants of a city of 25,000 and also charging the city for water, is sufficiently answered in the cases cited below, in which the correct doctrine is stated that, "But such siderations can not control the determination of the rights of the parties."

Hamilton Gas & Coke Co. vs. City of Hamilton, 146 U. S. 252; 36 L. Ed. 961-8.

Knoxville Water Co. vs. Knoxville, 200 U. S. 22; 50 L. Ed. 353.

Curtis vs. Whitney, 13 Wall. 68-70; 20 L. Ed. 513.

President, Etc. of Colby University vs. Village of Canandiagua, *supra.*

An equitable defense in an action at law can not be interposed in the Federal Courts.

It is a well established rule that the defendant in an action at law in the Federal Courts can not set up a defense that is an equitable one.

Miss. Mills vs. Cohn, 150 U. S. 202; 37 L. Ed. 1052.

Northern Pac. Ry. Co. vs. Paine, 119 U. S. 561; 30 L. Ed. 513.

Scott vs. Armstrong, 146 U. S. 439; 36 L. Ed. 1059.

Gravenberg vs. Law, 100 Fed. 1; C. C. A. 240.

"It is obvious and always has been held that a United States Circuit Court can not in the trial of an action at law exercise the powers of a court of equity."

Security Trust Company vs. Black River Nat. Bank, 187 U. S. 211; 47 L. Ed. 147.

The evidence fails to disclose that the defendant or its predecessors in interest ever asked permission from the city to assign or transfer to the defendant, a foreign corporation, any privilege or license granted by said ordinances.

We contend that the Artesian Hot and Cold Water Company of Idaho, being a mere creature of the law, had no authority without consent of the city to transfer any privilege or license it may have had to the defendant, a West Virginia corporation, and thus authorize a stranger to the city to come into the city and exercise this privilege or license; that the defendant company has not plead sufficient facts to enable it to exercise this privilege or license. It having failed, as heretofore stated in this brief, to disclose by its answer and the evidence any contract, and that its pretended purchase of the Idaho company's privilege and license was void.

Pullman Co. vs. Transportation Co. 139 U. S. 1; 35 L. Ed. 55.

Thomas vs. West Jersey R. R. Co. 101 U. S. 71; 25 L. Ed. 951.

Penn. Ry. Co. vs. St. Louis Ry. Co. 118 U. S. 290; 30 L. Ed. 83.

Snell vs. City of Chicago, 152 U. S. 191; 38 L. Ed. 408.

O. R. N. Co. vs. O. R. Co. 130 U. S. 1; 32 L. Ed. 837.

Gibbs vs. Gas Co. 130 U. S. 396; 32 L. Ed. 979.

The authorities relied upon by defendant in the court below concerning the questions involved in this case are clearly distinguishable upon the facts, as it will be noticed

that they are cases where the Courts had before them the consideration of contracts or ordinances possessing all the elements of a contract for a definite period. Our attention was especially called to the Walla Walla case, 172 U. S. 1, by defendant as settling the question of its having a franchise. The Court will discover upon an examination of that case that there was an express agreement on the part of the city of Walla Walla not to build water works of its own during a period of twenty-five years, the terms of the contract. No such ordinance or question was presented in that case as is in the case at bar.

In presenting the questions involved in this case we have endeavored to draw the distinction recognized by the authorities between a corporation having an express contract or franchise for a definite period of time and possessing all the elements of a contract with a municipality for the use of its streets, and where a corporation having merely permission to lay water pipes in the streets for an indefinite time which is a license subject to the payment to the city of compensation for a continuation of the privilege thereby granted. It is manifest that there is a clear distinction in this regard, and also between grants conferred directly by the Legislature and those which come from the local authorities of a municipality.

For the reasons given we insist that the judgment rendered herein should be reversed.

Respectfully submitted,

F. B. KINYON,

City Attorney of Boise, and

CAVANAH & BLAKE,

Attorneys for the Plaintiff in Error.

Residence Boise, Idaho,

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

BOISE CITY, A Municipal Corporation of the State of Idaho (Plaintiff),
Plaintiff in Error

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, (a Corporation), (Defendant),
Defendant in Error

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

STATEMENT OF CASE.

This is an action at law originally commenced by Boise City in the State court against the defendant water company to collect over ten thousand dollars claimed to be due under a city ordinance which seeks to impose a tax upon defendant for using the streets of the city. The defendant company is organized under the laws of West Virginia and

removed the case to the Circuit Court of the United States on the ground of diverse citizenship. The defendant thereupon filed an answer to the complaint, a demurrer to the answer was interposed by plaintiff, a hearing on the demurrer was had before Judge Gilbert and the demurrer was overruled. The main questions involved in the case were decided in favor of the defendant in the opinion overruling the demurrer. The case afterwards came up for final hearing upon an agreed stipulation of facts and some new questions of law raised by the city. Judgment was rendered in favor of the defendant on the final hearing and the city brought the case to this Court by writ of error.

The principal question in the case involves the construction of the grant of July 10th, 1890, from the city to the Artesian Water and Land Improvement Company, a corporation, its successors and assigns of "the privilege of laying down and maintaining water pipes in the streets and alleys now laid out or hereafter to be laid out and dedicated in Boise City." (Trans. pp. 22, 31-32.)

The Artesian Water and Land Improvement Company was a corporation organized under Chapter V of Title IV of the Idaho Civil Code, the material sections of which are hereinafter quoted in full, and that company accepted the above ordinance, constructed a water works system and the defendant in error is successor in interest of that company. (Trans. p. 22, par. VII of answer, which is admitted by the stipulation on p. 39, par. 3.)

The contention of the city is that because no time limit or period of duration for this grant was placed therein by the Common Council, it is merely a revocable license.

Chapter V of Title IV of the Civil Code under which the Artesian Water and Land Improvement Company was organized, provides:

"Sec. 2710. No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years.

"Sec. 2711. All corporations formed to supply water to cities or towns must furnish pure, fresh water to the inhabitants thereof for family uses, so long as the supply permits, at reasonable rates and without distinction of person, upon proper demand therefor; and must furnish water to the extent of their means in case of fire or other great necessity, free of charge. The rates to be charged for water must be determined by commissioners to be selected as follows:

"Two by the city or town authorities, or when there are no city or town authorities, by the Board of Commissioners of the County, and two by the water company; and in case a majority cannot agree to the valuation, the four commissioners must choose a fifth commissioner; if they cannot agree upon a fifth, then the probate judge of the county must appoint such fifth person. The decision of the majority of the commissioners must determine the rates to be charged for water for one year, and until new rates are established. The Board of County Commissioners or the proper city or town authorities may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the State."

This section was amended by Act of March 9th, 1905, and the part relating to furnishing water free of charge was stricken out, and was also amended by the Act of March 16th, 1907, 9 Ses. 556, to apply to "all *persons, companies,* or corporations supplying water to towns and cities."

"Sec. 2712. Any corporation created under the provisions of this title for the purposes named in this chapter, subject to the reasonable direction of the Board of County Commissioners, or city or town authorities, as to the mode and manner of using such right of way, may use so much of the streets, ways and alleys in any town or city or county, or any public road therein, as may be necessary for laying pipes for conducting water into any such town, city or through or into any part thereof.'

Other statutory and charter provisions which may have a bearing on the case, are as follows:

Franchises May Be Sold Like Other Property.

"For the satisfaction of any judgment against a corporation authorized to receive tolls, its franchise and all the rights and privileges thereof, may be levied upon and sold under execution in the same manner and with like effect as any other property." (Rev. Stat., Sec. 2642.)

The charter of Boise City, approved January 11, 1866, provides as follows:

"Sec. 3. For the government of said city there shall be elected biennially a Mayor, a Common Council consisting of five members, a Collector, a Treasurer and a Justice of the Peace for said City * * *." (Special and Local Laws, 1887, Section 130.)

This was amended by Act of March 14th, 1901, as follows:

"The power and authority given to the municipal corporation of Boise City by this Act, is vested in the Mayor and Common Council, and in the Departments authorized by their act, and by their successors in office, to be exercised in the manner hereinafter prescribed." (Rev. Ord. Boise City, page 4, Sec. 5.)

Section 5, Subd. 9, is as follows:

> "The Mayor and Common Council shall have full power and authority within Boise City * * * to provide the city with good and wholesome water; and for the erection or construction of such water works and reservoirs within or without the limits of the city, as may be necessary or convenient therefor * * *."

Section 10 provides:

> "The roads, streets and alleys within said city limits shall be under the exclusive control of said Common Council, who shall make all needful rules in relation to the improvements, repair, grading, cleaning, etc., of the same, and said city shall not be included in any road district in said county * * *."

Section 40 provides:

> "This Act shall be deemed a public Act, and may be read in evidence without proof, and judicial notice shall be taken thereof in all courts and places."

Section 2653 of the Revised Statutes of 1887; Sec. 2792 of the Revised Codes of 1908 provides that a foreign corporation which has complied with the law, by performing the acts set forth in the first allegation of defendant's answer, which are admitted by the stipulation to have been done by the defendant,

> "shall have all the rights and privileges of like domestic corporations, including the right to exercise the right of eminent domain and shall be subject to the laws of the State applicable to like domestic corporations."

ARGUMENT.

The case relied upon by the city to sustain its contention as to the grants being revocable at the will of the city

council, is *Boise Artesian Hot and Cold Water Co. v. Boise City,* 123 Fed. 232; 59 C. C. A. 236, in which this Court had under consideration another ordinance granting rights to Eastman Brothers and their successors in interest, to use the streets.

An entirely different question was presented in that case, viz: whether the water company was required to furnish water under Sec. 2711, for fire purposes free of charge. The grant to the Artesian Water and Land Improvement Company was not before the court for consideration in that case, but the only ordinance considered was the one to individuals, which could not be construed to come within the provisions of the sections of the Code, quoted above, relating to water and canal corporations. This distinction is clearly pointed out in the opinion of the court below in overruling the demurrer to the answer (Trans. pp. 50-56) and we can add nothing to that very complete and conclusive discussion of the question. Our contention is that the conclusion reached by the learned Judge is absolutely correct and that it is unnecessary to discuss the Eastman ordinance or the language used by this court in the former case in construing that ordinance.

If any authority were considered necessary to the effect that the section of the statute relating to the duration of the grant to the corporation, in force when the grant of July 10th, 1890, was made, should enter into and form a part of a contract, we would refer to the rule in

Walker v. Whitehead, 16 Wall. 314, 317,

that laws existing at the time and place of making a contract, and where it is to be performed whenever they affect its validity, construction, discharge and enforcement, enter into and form part of the contract and no subsequent legislation could alter them, and that they are parts of the obli-

gation which is guaranteed by the constitution against impairment.

To the same effect are

Von Hoffman v. City of Quincy, 4 Wall. 550;
Tomlinson v. Jessup, 15 Wall. 457;
Edwards v. Kearzey, 96 U. S. 595, 601;
Brine v. Insurance Co., 96 U. S. 627, 634, 637;
Pritchard v. Norton, 106 *U. S.* 124.

These cases hold that such statutes are as much a part of the contract as if incorporated into them and that the parties must be presumed to have acted with reference to the statutes in force governing the question.

Applying that principle to this case, if the ordinance of July 10th, 1890, contained the language of the statute, to-wit: this contract or grant shall not be "for a term exceeding fifty years", no one would contend that the parties contemplated that it might be revoked at the will of the city after it had been acted upon in good faith by the company. It has never been contended by the city that there is any other theory upon which the taxing ordinance in controversy can be sustained unless it be that the grants to the defendant's predecessors in interest are revocable licenses. In other words, it has been conceded by the city that if the defendant possesses any contract rights under those grants, the ordinance in controversy would amount to an impairment thereof. We deem it unnecessary therefore to make more than the briefest reference to a few of the many cases which hold that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets upon the condition of the performance of its service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract

protected by the Constitution of the United States against impairment.

Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 9;

and cases cited in the opinion.

Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 577-78;

Vicksburg Waterworks Co. v. Vicksburg, 185 U. S., 65, 80-82;

Vicksburg v. Vicksburg Waterworks Co., 202 U. S., 453;

Vicksburg v. Vicksburg Waterworks Co., 202 U. S., 496.

The same principle with reference to grants of right to use of streets for railroad tracks.

Cleveland v. Cleveland City Ry. Co., 194 U. S., 517;

Northern Pac. Railway Co. v. Duluth, 208 U. S., 583, 591.

And the following cases which hold that grants of this character although silent as to the term, are nevertheless, within the protection of the Constitution of the United States.

National Waterworks Co. v. Kansas City, 65 Fed. 691;

Des Moines City Railway Co. v. City of Des Moines, 151 Fed. 854;

Baltimore Trust & Guarantee Co. v. Mayor of Baltimore, 64 Fed. 153;

City of New Orleans v. Telephone and Telegraph Co., 40. La. An. 41, 3 So. 533,

where the same question was raised as in this case and a tax was attempted to be levied for the use by the company of the streets, on the theory that the company has merely a revocable license to use the streets because there was no time limit contained in the grants.

Old Colony Trust Co. v. Wichita, 123 Fed. 762;

Suburban Electric Light & Power Co. v. East Orange, 41 At. 865;

City of Los Angeles v. The Los Angeles City Water Co., 61 Cal. 65,

holding that a license imposed upon all persons or corporations not municipal, vending water for domestic purposes, monthly rates or licenses, was void citing *Stein v. Mayor of Mobile,* 49 Ala. 362.

See also:

Arcata v. Arcata & Mad. River R. Co., 92 Cal. 639, 644;

John Savage v. City of Salem, 23 Ore. 381; 31 Pac. 832; 37 Am. St., 688; 24 L. R. A., 787;

Milhau v. Sharp, 27 N. Y. 611;

People v. Sturtevant, 9 N. Y. 263;

David v. Mayor, 14 N. Y. 506.

Mayor v. Railway Co., 32 N. Y. 261;

Railroad Co. v. Kerr, 72 N. Y. 330;

People v. O'Brien, 111 N. Y. 1.

Re Brooklyn, 143 N. Y. 596;

People ex. rel. Flatbush Gas. Co. v. Coler, 103 N. Y. Supp. 590.

cited in the opinion of the court below.

N. W. Tel. Ex. v. Minneapolis, 81 Minn. 140;

Borough of Shamokin v. Ry. Co., 178 Pa. St. 120;

Providence Gas Company v. Thurber, 2 R. I., 15;

Rutland Elec. Light Co. v. Marble City Elec. Light Co. 65 Vermont 377; 26 At. 653;

Monongahela Nav. Co. v. United States, 148 U. S. 312, 344;

Wyandotte Elec. Light Co. v. Wyandotte, 124 Mich. 43, 47, 82 N. W., 821.

In *Joyce on Franchises,* Sec. 313, p. 493, the author in discussing this question says:

> "If no term is specified but the laws of the state place a limitation upon the duration of the grant, then during such period there can be no impairment of the contract obligation unless the right is reserved to the city to nullify the grant."

Doctrine of Estoppel as Against City.

For sixteen years until the passage of the ordinance in controversy, the city has always recognized the right of defendant and its grantors, to lay down and maintain their water pipes in the streets and alleys of the city and has permitted them to erect and maintain an expensive plant and has accepted the benefits accruing to the public by reason of the furnishing by them of pure and healthful water, and the city had dealt with the water company in the matter of fixing rates as late as a year previous to the passage of the ordinance in question.

In the fixing of these rates the commission figured a net return to the water company of six per cent on the valuation of its plant at that time and did not take into consid-

eration any such tax as the one in question. (Trans. p. 40, par. 8 of stipulation.)

In a number of the cases cited above the doctrine of estoppel was applied against the municipality, under similar conditions. See

National Waterworks Co. v. Kansas City, supra;

Monongahela Nav. Co. v. United States, supra;

City of New Orleans v. Telephone & Telegraph Co., supra.

In *Omaha Water Co. v. City of Omaha,* 156 Fed. 922, similar in many respects to this case, the Circuit Court of Appeals of the Eighth Circuit held that:

> "a municipal corporation in respect of its purely business relations as distinguished from those that are governmental is held to the same standard of just dealing that the law prescribes for private individuals."

In *Union Depot Co. v. St. Louis,* 76 Mo. 393, 396, it was held that where a city had granted a franchise to a Union Depot Company to use, and occupy streets and the company had erected costly buildings thereon, the city cannot afterwards object. The court said:

> "When a municipal corporation enters into a contract which it has authority to make, the doctrine of estoppel applies to it with the same force as against individuals."

The distinction between a city acting in a governmental and in a proprietary or quasi-private capacity is clearly pointed out in So. Bell Tel. Co. v. Mobile, 162 Fed. 531-32, and is held in the latter case to be governed by the same rules that govern a private individual or corporation, citing numerous cases.

Intention of the Parties.

This, we submit, is a proper question to be considered and we refer to the opinion of the Court on page 55 of the Transcript, and to the language of the Supreme Court in *Detroit v. Detroit Citizens St. Ry. Co.,* 184 U. S., on pages 384 and 398, where the question is fully discussed.

Application of Sec. 2710 to Boise City.

This question, which was presented by the city for the first time on the final hearing, is so completely answered in the opinion of the court (Trans. pp. 57-63), that little remains to be said on the subject.

The contention of the city that the case of *Boise City National Bank v. Boise City,* 15 Ida. 792, makes the general corporation laws of Idaho including Sec. 2710, limiting grants of this kind to 50 years, inapplicable within Boise City, because that city is operating under a special charter, is set at rest by the decision of the Supreme Court of Idaho in *City of Boise v. Artesian Hot & Cold Water Co.,* 4 Ida. 351, 39 Pac. 562, which was decided in 1895, when Boise City was operating under the special charter as at present. The city brought the action to compel the water company to furnish water to the city free of charge for fire purposes as required by Sec. 2711 of the Code. The court held that the complaint of the city must set forth the ordinances or contracts under which the water company was supplying water to the city as required by Sec. 2710, thus recognizing the application of that section to Boise City. The city itself in commencing that suit insisted upon the application of Sec. 2711, which is a part of the same chapter, because its contention that the water company must furnish water for fire purposes free was based entirely upon that section. In appointing the commission to fix the rates to be charged by defendant for water, the city also acted under Sec. 2711.

Moreover, an examination of the case of *Boise City Natl. Bank v. Boise City*, clearly shows that the court did not hold that the general corporation laws of the State have no application in cities governed by a special charter, but only that the general laws relating to the government of cities and villages not under special charter, have no application in purely municipal matters to questions covered by the provisions of the special charter. In that particular case it had to do with the manner of paying for sewer construction. The general laws governing cities and villages permitted the payment to be made in ten annual installments. The special charter of Boise covered fully the matter of sewer construction and provided for a different method of payment, and the court held that the general law did not apply.

It is clear that the chapters of the Code relating to private corporations do not deal primarily with the government of cities and towns or municipal affairs and it is only incidentally that they affect Boise City and they relate to matters not dealt with in the special charter. It would follow that the decision relied upon can have no bearing upon this case.

We find on page 34 of brief of plaintiff in error, this statement:

> *"The evidence fails to disclose that the defendant or its predecessors in interest ever asked permission from the city to assign or transfer to the defendant, a foreign corporation, any privilege, or license granted by said ordinances."*

When the right to lay water pipes in Boise City was granted to the Artesian Water and Land Improvement Company the privilege was granted to the latter company, its successors or assigns. (Trans. pp. 66-7, par. IV.) Since

the granting clause to successors or assigns is clear, the contention of plaintiff in error must be predicated upon the basis that since the assignee is a foreign corporation it suffers a disability which would not attach to a domestic corporation.

The laws of Idaho provide (Rev. Codes Sec. 2792):

> "That foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic corporations including the right to exercise the right of eminent domain, and shall be subject to the laws of the State applicable to like domestic corporations."

This section expressly clothes the defendant in error with all the rights an dprivileges of domestic corporations. Full compliance by defendant in error with laws of Idaho, relating to foreign corporations is admitted by plaintiff in error (allegation 1 Trans. p. 19, stipulated as true, Trans. p. 80).

Our position is that defendant in error has acquired this consent and that its right to exercise the assignment of the franchise in question can not be disputed. It has been endowed with this power by the voluntary act of the State of Idaho.

Our contention is in reality supported by counsel for plaintiff in error, for when their argument is reduced to its last analysis, it discloses their position to be that defendant in error took no rights by assignment, since, while a franchise or contract would be assignable, a license is not. (Brief of Pl. in Error, p. 35.)

This begs the real question at issue, which is, Has defendant in error a franchise or merely a revocable license? The weakness of the position of opposing counsel is that to support their contention they assume it as a working hypothesis.

In the cases cited by plaintiff in error the grants were not made directly to the successors or assigns and the court held that a corporation cannot, without the consent of the legislature, transfer its franchise to another corporation and "abnegate the performance of the duties to the public," imposed upon it as the consideration of the grant.

Obviously this rule has no application where the grant is expressly made to the assigns of the grantee, who continue to perform the duties to the public under the supervision and control of the granting power, precisely the same as before the transfer was made. The city has exercised the right to control this defendant and has joined in fixing maximum rates to be charged, as alleged in the answer and admitted by the stipulation, and there is no evidence whatever that the city or its inhabitants are in any manner affected through the abnegation of any duties growing out of the grant.

The right to transfer a franchise under conditions like those in case at bar has been sustained by the Supreme Court of Idaho in the case of

Evans v. Kroutinger (*supra*);

Cases directly in point are:

Old Colony Trust Co. v. City of Wichita, 123 Fed. 762, affirmed 132 Fed. 641;

San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075;

Los Angeles v. Los Angeles City Water Co., 177 U. S. 575;

People v. Stanford, 77 Cal. 371;

Com. Elec. Light & Power Co. v. Tacoma, 17 Wash. 661, 50 Pac. 592.

In the case of *Evans v. Kroutinger* (*supra*) the court in the syllabi, said:

> "1. A ferry franchise may be voluntarily transferred the same as any other incorporeal hereditament.
>
> "2. The franchise granting power retains the same control over the franchise in the hands of the assignee as it does while it is still exercised by the original grantee.
>
> "3. The franchise granting power alone can question the right of the assignee of such franchise to exercise its rights and privileges."

At page 770 of 123 Fed. in the case of *Old Colony Trust Company v. City of Wichita*, the court said:

> "The effect of this deed was to tranfer the benefits of this ordinance to the Missouri corporation, and the United Telephone Company had the right to transfer it because the ordinance granted the franchise to the 'United Telephone Company, its successors or assigns', and the fact that the title of the ordiance does not specify that the franchise is not granted to the 'successors and assigns' of said telephone company, in the opinion of the court does not restrict the provisions of the ordinance to the United Telephone Company alone. That omission in the title (if it can be called an omission) could not possibly mislead any one. No one could read two lines of the first section of the ordinance without discovering that the ordinance was granted to the United Telephone Company, 'its successors and assigns.' "

An able discussion of the question is also found in

American Loan & Trust Co. v. General Electric Company, (N. H.) 51 At. 660, 661-664.

In *Mayor etc of Knoxville v. Africa,* 77 Fed. 501, 23 C. C. A. 252, the Circuit Court of Appeals of the Sixth Circuit, speaking through Judge Lurton, on page 505 of 77 Fed. said:

> "A right of way upon a public street, whether granted by act of the legislature, or ordinance of a city council or in any other valid mode is an easement and as such is a property right capable of assignment, sale and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts. *City of Detroit v. Detroit Citizens St. Ry. Co.,* 22 U. S. App. 570, 12 C. C. A. 365 and 64 Fed. 628, *Louisville Trust & Banking Co. v. City of Cincinnati* (decided at present term) 76 Fed. 296."

See also:

> *Michigan Tel. Co. v. City of St. Joseph,* 121 Mich. 502, 80 N. W. 383,

where the court upholds the right to transfer the franchise to use streets and quotes with approval the last clause from Crosw. Electricity, Sec. 158, as follows:

> "If the grant is in terms to X, his successors and assigns or similar language it is assignable."

Incorporation is a status created by the law of the chartering State and the corporation has the nature and the powers which that State confers and all matters concerned with its existence and its nature should be determined by the law of that State (Taney, C. J., in *Bank of Augusta v. Earle,* 13 P. 519). Defendant in error was organized for the purpose of supplying the plaintiff in error with water, and to take, purchase, acquire, hold, operate and maintain the rights and properties of water companies and to acquire, own, use, operate and maintain all properties, franchises, etc., of

its predecessor in interest. (See first allegation of answer, Trans. pp. 19-20, which is admitted by stipulation, Trans. p. 80.)

As to the denial (Pltf. in error's brief, p. 34) of the right of the Artesian Hot and Cold Water Company of Idaho, "being a mere creature of the law," to transfer any privilege to defendant in error, we think counsel have not distinguished between the assignment of the franchise to be a corporation and the franchise to use the corporate property for the purposes for which the corporation was organized. We admit the franchise to be a corporation is not assignable. But the right of a corporation to assign any franchise other than its franchise of being a corporation is clear. The franchise of the Artesian Hot and Cold Water Company could as well be exercised by natural persons. Corporate existence is not essential to its use and enjoyment. There was nothing in its nature inconsistent with its being assignable. It could not be held that when a mortgage on the company and its franchises was authorized by law, the attempt of the mortgagor to enforce the mortgage would destroy the main value of the property by the destruction of its franchises.

We realize that as to all rights and liabilities of a corporation created as a result of acting in a foreign State, it is to be dealt with entirely according to the law of the State in which it acts. But the defendant in error is asking no special privilege or immunity denied domestic corporations since the grant by the city to the Artesian Water and Land Improvement Company was to its successors or assigns. Defendant in error having complied with all the requirements demanded of foreign corporations by Idaho, took a vaild assignment of this grant which we contend is a franchise not to be impaired by the imposition of a license tax.

Question Must Be Raised by Quo Warranto.

Yet, for the purposes of argument, let us assume that defendant in error has usurped some privilege, license or franchise, and that the transfer of the same was illegal, there must first be an adjudication of forfeiture against the defendant in error in a proceeding by the County Attorney in accordance with the following statute, Sec. 4612 Rev. Codes of Idaho and of the Rev. Stat. of 1887, which provides for quo warranto proceedings and which reads:

> "An action may be brought in the name of the people of the State against any person who usurps, intrudes into, holds or exercises any office or franchise, real or pretended, within this State, without authority of law. Such action shall be brought by the prosecuting attorney of the proper county, when the office or franchise relates to a county, precinct, or city, and when such office or franchise relates to the State, by the Attorney General; and it shall be the duty of the proper officer, upon proper showing, to bring such action whenever he has reason to believe that any such office or franchise has been usurped, intruded into, held or exercised without authority of law. Any person rightfully entitled to an office or franchise may bring an action in his own name against the person who has usurped, intruded into, or who holds or exercises the same."

That the franchise granting power alone can raise the right of the assignee of such a franchise to exercise its rights and privileges was decided by the Supreme Court of Idaho in the case of

Evans v. Kroutinger, 9 Ida. 153, 72 Pac. 882;

To the same effect:

National Bank v. Matthews, 98 U. S. 621, 628;

People ex rel Sabichi v. Los Angeles Elec. Ry. Co., 91 Cal. 338;

Milwaukee Electric Ry. and Lt. Co., v. City of Milwaukee, (*Wis.*) 69 N. W. 794.

We deem a further citation of authorities unnecessary to show that if this defendant in error has usurped title to any rights, easements or franchises, it is a matter not to be adjudicated in an action by the city to collect a license tax.

For the foregoing reasons we respectfully submit that the judgment of the court below should be affirmed.

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